

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DIANA L. HARDY,)	
)	
Claimant,)	
v.)	
)	
HEALTHSOUTH TREASURE)	IC 02-019290
VALLEY HOSPITAL,)	
)	
Employer,)	FINDINGS OF FACT,
)	CONCLUSION OF LAW,
and)	AND RECOMMENDATION
)	
PACIFIC EMPLOYERS)	
INSURANCE COMPANY,)	August 24, 2006
)	
Surety,)	
)	
Defendants.)	
_____)	

INTRODUCTION

The Industrial Commission assigned this matter to Referee Lora Rainey Breen, who conducted a hearing in Boise on April 25, 2006. John F. Greenfield represented Claimant and Glenna M. Christensen represented Defendants. The parties submitted oral and documentary evidence at hearing and took no post-hearing depositions. They then submitted briefs and the matter came under advisement on June 19, 2006.

ISSUE

The sole issue to be determined at this time is whether and to what extent Claimant is entitled to past temporary total disability (TTD) benefits.

CONTENTIONS OF THE PARTIES

Claimant alleges entitlement to past TTD benefits because she was still in a period of recovery from her injury when Defendants terminated TTD payments.

Defendants contend Claimant is not entitled to any past TTD benefits because she was medically stable during the time periods when they ceased paying such benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The hearing testimony of Claimant; and,
2. Claimant's Exhibits 1 through 8 and Defendants' Exhibits A through I admitted at hearing.

After considering the record and briefs of the parties, the Referee submits the following Findings of Fact, Conclusion of Law, and Recommendation for review by the Commission.

FINDINGS OF FACT

1. At the time of hearing, Claimant was 54 years of age. She worked as an x-ray technologist beginning in the mid-1980's and started working for Employer in 2000. She spent most of her time at the clinical site for Orthopedic Associates and worked closely with orthopedic surgeon Timothy Doerr, M.D.

2. On December 9, 2002, she sustained a work-related low back injury while positioning a patient for an x-ray. She initially treated with Dr. Doerr and underwent several months of physical therapy. Her low back symptoms gradually worsened with a radicular component in both legs, left leg greater than the right.

3. On May 12, 2003, Dr. Doerr recommended surgery based on the results of a lumbar MRI, "which revealed a large left L2-3 disk herniation with bilateral nerve root

impingement.” Defendants’ Exhibit A. Surety approved the surgery.

4. Because of their close working relationship, Dr. Doerr and Claimant felt another physician should perform the surgery and, on August 29, 2003, Claimant saw neurosurgeon Peter Reedy, M.D. Dr. Reedy recommended a surgical repair at L2 related to the December 9, 2002 accident. However, he also recommended surgery at the L4-5 level related to a 1991 accident covered by another surety. Dr. Reedy’s attempts to get both procedures completed at the same time (coordinated through two sureties) spanned several months and ultimately resulted in Dr. Reedy suggesting Claimant transfer her care to another surgeon in about March 2004.

5. Claimant continued working her usual job until February 2004, when she was unable to move the x-ray machine due to back pain. Her job required her to lift “upwards to a hundred pounds.” Hearing Transcript, p. 31. She saw Dr. Shuknecht, who placed her on work restrictions that included working only four hours per day along with lifting and other activity restrictions.

6. On May 5, 2004, Claimant saw Michael Gibson, M.D., to reassess her restrictions. She wanted to go back to working eight hours per day. Dr. Gibson noted she had not yet seen another surgeon and referred her to see a surgeon of her choice. He also adjusted her restrictions to allow for an eight-hour workday in conjunction with ongoing limitations including a ten-pound lifting limit and no repetitive bending, twisting, or stooping and no overhead work or patient transfers. Claimant resumed full-time, somewhat lighter work with Employer.

7. On May 20, 2004, Claimant returned to see Dr. Doerr, who noted she had failed a year and a half of conservative treatment including anti-inflammatories, activity restrictions, physical therapy, and injections, and that “the next reasonable option other than further

observation would be an L2-3 bilateral discectomy.” Defendants’ Exhibit A. Dr. Doerr offered at that point to perform the surgery, which Surety approved and Claimant attempted to schedule in June 2004. It was cancelled several times for different reasons and Claimant opted to again seek another physician.

8. On July 29, 2004, Claimant saw orthopedic surgeon Howard King, M.D., who recommended a conditioning and strengthening program. On October 11, Claimant presented with continuing symptoms. Dr. King noted her May 2004 MRI showed a “fairly good-sized disk at the L2-3 level, causing probably a fairly significant amount of spinal canal narrowing.” He felt it was a “good plan” to consider surgery if symptoms persisted. Defendants’ Exhibit D. He referred her to neurosurgeon Paul Montalbano, M.D., for a second opinion.

9. Dr. Montalbano saw Claimant on October 17, 2004. After reviewing her MRIs, he described an L2-3 disk herniation with significant spinal canal stenosis. He recommended continuing physical therapy for six consecutive weeks and, if that failed, undergoing an L2-3 microdiscectomy.

10. In October 2004, Employer terminated Claimant’s employment because it sold the x-ray equipment with which she worked. Surety began paying TTD benefits.

11. On December 17, 2004, Claimant reported some progress with physical therapy to Dr. King. According to his notes, she described continuing low back pain, but her leg pain had virtually gone away (at pp. 49-50 of the hearing transcript, Claimant disputes Dr. King’s characterization of an absence of lower extremity symptoms, although she concedes improvement). Dr. King noted she was not ready to go back to work and he would continue her physical therapy and have her check back in six weeks.

12. On March 17, 2005, Claimant saw Dr. Montalbano again for her low back and

lower extremity symptoms. He noted she had “somewhat” improved with physical therapy, but her pain syndrome was still an issue. He wrote, “It is uncertain whether her L2-3 disc herniation is the etiology of her symptomatology.” Defendants’ Exhibit E. He did not address treatment recommendations, but described a repeat MRI as showing no change to her L2-3 herniation.

13. On March 18, 2005, orthopedist Gerald McManus, M.D., examined Claimant at Defendants’ request. He described complaints involving mid and low back pain and leg and gluteal pain, with the left lower extremity significantly worse than the right. Claimant described the worst pain as occurring right after the injury, with her present level at about 50% of that; her symptoms worsened on days when she attended physical therapy. Dr. McManus summarized his clinical findings and noted the following significant negative/equivocal findings: no loss of girth in lower extremities; no loss of reflex, sensation or strength in lower extremities; and, no positive nerve tension signs. He observed no contradictory findings indicative of voluntary symptom magnification and made a positive objective finding of increased lumbar lordosis.

14. In his report of March 24, 2005, Dr. McManus diagnosed Claimant with lumbar spondylosis/degenerative disc disease of the lumbar spine with a central and left central large subligamentous extruded disc at L2-3, with moderate stenosis at L2-3 on the left, without significant radicular symptoms. He considered this condition stable and opined Claimant had reached maximum medical improvement. He assigned permanent work restrictions including maximum lifting of 60 pounds on a rare occasion, 35 pounds occasionally, and no more than occasional twisting, bending, and stooping. He recommended against operative treatment in the absence of greater evidence of compression of neural structures on imaging or by objective findings of radiculopathy. He assessed a 4% whole person impairment for the 12/9/02 injury.

15. On March 28, 2005, Surety terminated TTD benefits based on Dr. McManus’

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report.

16. On March 31, 2005, Dr. King indicated Claimant was doing well with most things, but was still unable to do any overhead lifting or pulling to the left. He recommended she see Dr. Michael McClay and attend a Work Fit program. On April 21, 2005, Surety notified Dr. King that Claimant would be starting the LifeFit Program on May 2, for four weeks, and would have pain intervention with Dr. McClay during that time. On May 5, 2005, Dr. King concurred with Dr. McManus' 4% impairment rating.

17. Claimant attended the LifeFit Program from approximately May 2 through 27, 2005. Surety paid TTD benefits during this time, and thereafter terminated them again.

18. The final LifeFit staffing notes indicated that the medical director, Robert Friedman, M.D., felt Claimant's function "had significantly increased and almost doubled, despite her pain feeling worse." Claimant's Exhibit 5. Further, Dr. Friedman recommended against surgery and thought the "patient's discs have probably gone back in." *Id.* He released Claimant from the program with temporary limitations including light to medium level work and avoidance of prolonged low frequency vibrations and torquing maneuvers (combined bend/lift/twist) and recommended an independent fitness program for three months. He expected Claimant's physical capacity to increase by 10% per week for six weeks, at which time she could perform at her anticipated permanent work level, *i.e.*, medium level work. He provided a return to work date of May 31, 2005. On May 25, 2005, Dr. Friedman concurred with Dr. McManus' impairment rating.

19. The functional capacity assessment performed at the conclusion of the LifeFit program demonstrated ongoing low back and left lower extremity complaints.

20. On June 7, 2005, Claimant reported no significant benefit from the LifeFit

Program to Dr. King. She was still symptomatic, “as she has been in the past.” Defendants’ Exhibit D. Dr. King discussed the possibility of another surgical opinion and encouraged her to continue with pain management through Dr. Friedman. Beyond that, he had no further treatment recommendations.

21. On January 12, 2006, Claimant saw neurosurgeon Tyler Frizzell, M.D., with continuing symptoms including low back pain and radiation of pain into her legs, left greater than right, down to the ankle on the left and to the knee on the right. Dr. Frizzell noted Claimant had not returned to work and had completed the LifeFit Program. He opined Claimant required surgery at L2-3, and explained:

First, Diana has tried extensive conservative treatment without success and continues to have intractable and radicular symptoms.

Second, it is more likely than not that her present symptoms are related to the L2-3 disc herniation. The medical literature supports the presence of back pain from significant thecal sac compression, which this lumbar disc herniation causes.

Third, Diana has lost the ability to perform her vocation as a radiologic technician because of her 12/9/02 work injury and associated disc herniation. While a surgical procedure to address this may not be able to allow her to return to her previous vocation, it is clear to me that without such a procedure her ability to perform work of any kind is in question.

Defendants’ Exhibit H.

22. Surety approved the recommended L2-3 discectomy, which Dr. Frizzell performed on February 22, 2006. At surgery, he identified a large central herniation and left-sided herniation extending out to the neural foramina. Surety reinstated payment of TTD benefits on February 22, 2006, but continued to deny Claimant’s entitlement to TTD benefits for March 28, 2005 through May 1, 2005, and May 28, 2005 through February 21, 2006.

23. At hearing, Claimant was still recovering from surgery and attending physical

therapy. However, she testified that, aside from an occasional twinge, the primary pain down her leg is gone. Claimant was a credible witness.

DISCUSSION AND FURTHER FINDINGS

1. **Temporary Total and/or Temporary Partial Disability.** Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees “during the period of recovery.” The burden is on a claimant to present evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980). Once a claimant is medically stable, he or she is no longer in the period of recovery, and total temporary disability benefits cease. Jarvis v. Rexburg Nursing Center, 136 Idaho 579, 38 P.3d 617 (2001).

Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, he or she is entitled to temporary disability benefits unless and until such evidence is presented that he or she has been released for light duty work *and* that (1) his or her former employer has made a reasonable and legitimate offer of employment to him or her which he or she is capable of performing under the terms of his or her light work release and which employment is likely to continue throughout his or her period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his or her light duty work release. Malueg v. Pierson Enterprises, 111 Idaho 789, 727 P.2d 1217 (1986).

Defendants do not contend Employer offered Claimant light duty work which she failed to take or that light duty employment was reasonably available to Claimant in the general labor market; in other words, there is no Malueg analysis. The simple question is: had Claimant

reached medical stability, aka, maximum medical improvement (MMI) on March 28, 2005, when Defendants terminated TTD payments, as opined by Dr. McManus?

The Referee finds Claimant had not reached MMI on March 28, 2005, and was still in a period of recovery from her industrial injury. Following Dr. McManus' report, Dr. King recommended, and Claimant underwent, continuing and intense treatment involving physical therapy, occupational therapy, pain management, and psychological/social work consultations through LifeFit, Dr. Friedman, and Dr. McClay. Although Claimant's pain increased, the LifeFit records reflect significant gains in function. Moreover, Dr. Friedman provided a return to work date of May 31, 2005, and *temporary, not permanent*, limitations with expected improvements of 10% per week for six weeks. At that future point in time, Claimant was expected to move from a light/medium to a medium work level. The record does not contain a follow-up assessment confirming such additional improvements and Claimant remained symptomatic.

Most importantly, Dr. Frizzell opined in January 2006, as did other surgeons early in this matter, that Claimant required surgery to address her large disc herniation at L2-3. Defendants authorized the surgery on more than one occasion and then paid for it when it was performed in February 2006. Significantly, Dr. Frizzell's opinion was not based on "new" evidence contained in imaging studies or "new" symptoms; his opinion was based on the same MRIs and complaints observed by the many physicians who had seen Claimant over the years since the injury. Dr. McManus' opinion that Claimant had reached MMI in March 2005 was consistent with his medical opinion that she did not need surgery. However, Claimant did require surgery and whatever weight may have been given to Dr. McManus' opinion was undermined by that fact. Although Dr. King and Dr. Friedman agreed with Dr. McManus' impairment rating, their actions (recommending further aggressive treatment and assigning temporary restrictions) do not support

that Claimant had reached maximum medical improvement on March 28, 2005.

The weight of the medical evidence establishes that Claimant is still in a period of recovery from her December 9, 2002 injury. She is entitled to TTD benefits for the time periods in question: March 28, 2005 through May 1, 2005, and May 28, 2005 through February 21, 2006.

CONCLUSION OF LAW

Claimant is entitled to past temporary total disability benefits for the time periods in question: March 28, 2005 through May 1, 2005, and May 28, 2005 through February 21, 2006.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusion of Law, the Referee recommends that the Commission adopt such Findings and Conclusions as its own and issue an appropriate final order.

DATED in Boise, Idaho, on the 18th day of August 2006.

INDUSTRIAL COMMISSION

_____/s/_____
Lora Rainey Breen, Referee

ATTEST :

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __24__ day of __August_____, 2006, a true and correct copy of the foregoing **Findings Of Fact, Conclusion Of Law, And Recommendation** was served by regular United States mail upon each of the following persons:

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